

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 15, 2011

V

MARK ANDREW HENRY,

Defendant-Appellant.

No. 294750
Saginaw Circuit Court
LC No. 09-031982-FH

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of child sexually abusive activity, MCL 750.145c(2), and third-degree criminal sexual conduct, MCL 750.520d(1)(a). He was sentenced to concurrent prison terms of 75 months to 20 years for the child sexually abusive activity conviction and 75 months to 15 years for the third-degree criminal sexual conduct conviction. Defendant appeals as of right. Because the prosecutor did not appeal to the jury to sympathize with the victim, we affirm.

I. BASIC FACTS

In November 2008, the victim's brother discovered on defendant's computer three photographs of the victim masturbating. The brother downloaded the photographs onto his MP3 player and showed them to his mother. The mother and brother brought the photographs to the local police department, and a police investigation ensued.

In August or September 2008, the victim, then 13 years old, was released from juvenile detention. The victim's mother lived with her parents, but the victim's grandparents refused to let the victim live with them. The victim went to live with defendant, a family friend, and defendant's partner. He slept in the upstairs guest bedroom.

The victim testified that one day, while he was sitting on the couch in defendant's living room, defendant told him that he could make some easy money if he allowed defendant and some of defendant's friends to touch him. After the victim expressed skepticism, defendant started to "talk nasty" and took out a cellular telephone with a camera. He instructed the victim to masturbate, which the victim did, and defendant took three photographs of the victim.

The victim also testified that defendant touched him on several occasions. One day, he was lying on the bed in the guest bedroom, when defendant came into the bedroom and “start[ed] rubbing” him. Defendant then put his mouth on the victim’s penis. The victim pushed defendant away.

Defendant admitted that he took three photographs of the victim masturbating, but claimed that the victim asked him to take the photographs. According to defendant, he walked into the living room, where the victim “was doing his business.” The victim asked him to take some pictures and, “being ignorant of the law,” he agreed. He then downloaded the photographs to his computer for the victim, but thought he deleted them when he installed a new operating system in the computer. Defendant denied that he performed oral sex on the victim or touched the victim inappropriately.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that he was denied a fair trial when the prosecutor, during closing and rebuttal argument, elicited sympathy for the victim. We disagree.

To preserve a claim of prosecutorial misconduct for appellate review, a defendant must timely and specifically object to the alleged improper conduct. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant did not make a timely objection to any of the prosecutor’s alleged pleas for sympathy for the victim. Thus, defendant’s claims of prosecutorial misconduct are unpreserved. We review them for plain error affecting defendant’s substantial rights. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, with the prosecutor’s remarks evaluated in context and in light of the evidence presented and the defense arguments. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). A prosecutor is afforded great latitude regarding his arguments at trial. *Unger*, 278 Mich App at 236. He is free to argue all the evidence and reasonable inferences as they relate to his theory of the case, *id.*, and he may argue from the facts that a witness is credible, *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). However, a prosecutor may not interject issues broader than the defendant’s guilt or innocence. *Dobek*, 274 Mich App at 63-64. He may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988).

Defendant first claims that the prosecutor appealed to the jury to sympathize with the victim when the prosecutor asked the jury members to place themselves “in the shoes of a 14-year-old boy, having to tell a group of strangers what was done to him by [defendant].” It is generally improper for a prosecutor to ask jurors to place themselves in the victim’s position. *People v Buckey*, 133 Mich App 158, 167; 348 NW2d 53 (1984), rev’d on other grounds 424 Mich 1 (1985); *People v Leverette*, 112 Mich App 142, 151; 315 NW2d 876 (1982). However, when a prosecutor makes such a request, whether the request constitutes prosecutorial misconduct depends on the “crux” of the argument being made by the prosecutor. See *People v Cooper*, 236 Mich App 643, 652-653; 601 NW2d 409 (1999) (holding that the prosecutor’s

question to the jurors whether they would be angry if, like the victim, they were shot six times was not improper where the prosecutor's argument was that the victim's displays of anger during his testimony did not make his testimony incredible).

In this case, when the prosecutor asked the jury to place themselves in the shoes of the victim, he did not ask the jury to suspend their judgment and decide the case based on sympathy for the victim, *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994), nor did he ask the jury to convict defendant even if it was not convinced beyond a reasonable doubt of defendant's guilt, *Cooper*, 236 Mich App at 653. Rather, reading the comment in context, the prosecutor asked the jury to understand why the victim shared what defendant had done to him "in bits and pieces" and was embarrassed to testify at trial. The "crux" of the prosecutor's argument was that the victim was not an incredible witness because he was reluctant to testify. The comment was not improper.

Defendant next argues that the prosecutor elicited sympathy for the victim with the following comments:

And I submit to you that the defendant is a predator. Here we have a young man. We know he has had trouble. We now know that nobody in his family even wanted him living with them. [The victim] wasn't wanted. [The victim] went to [defendant] and asked if he could stay there. . . . This kid, this 13-year-old had noplac[e] [sic] else to go.

[Defense counsel] asked him:

Did you go back, even afterwards?

Yes, I did.

And I asked him:

[The victim], why did you go back?

I had noplac[e] [sic] else to go.

This is a kid that everybody has forgotten about. Everybody but the defendant. A kid that never would have said anything. The defendant knew that. He was right. But for [the brother] finding those photographs, the defendant would have been successful.

These comments were based on the evidence. The victim was not allowed to stay at his grandparent's home, where his mother was living, and he asked defendant if he could stay with defendant and his partner. The victim testified that defendant was the only person he had at the time. In addition, the victim did not tell anyone about the photographs or the inappropriate touching until after his brother discovered the photographs. The prosecutor, in the challenged remarks, used these facts to argue his theory why defendant engaged in inappropriate activity with the victim. The comments were not improper. *Unger*, 278 Mich App at 236.

Defendant also argues that the prosecutor used the following comments to get the jury to sympathize with the victim:

Why did [the victim] stay? Why didn't he tell?

Ever hear of the old statement been down so long looks like up to me?

Thirteen-year-old that has nowhere else to go. Yes, I guess we ought to hold that 13-year-old to a higher standard -- come on kid, you are 13, you can make it on your own. Get out there and do something. You're 13, no big deal.

* * *

As I recall he said they were two different days. The photos were one day, and he remembers the other day because that was September 16th, the day before he went to his grandparents. And going to the grandparents might be something that that [sic] 13-year-old may remember, because he doesn't normally get to his grandparent's. But if you're 13, and you have been ostracized by your family, and you're suddenly back going to your grandparents -- is that a day you might remember if you're 13, and forced to live out there on your own, to fend for yourself any way you can.

These comments, which were made in rebuttal argument, must be considered in light of defendant's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). In his closing argument, defendant asserted that the jury would have to base its verdict on whether it believed him or the victim, and he then attacked the victim's credibility. He argued that the victim's "embarrassment" did not provide an explanation for why the victim continued to live with him. He also argued that it would have been impossible for him, as he suffers from physical disabilities, to get the victim from the couch in the living room, where the photographs were taken, to the upstairs bedroom, without his partner hearing or seeing something. The prosecutor's remarks were in direct response to defendant's arguments. The prosecutor responded that the victim stayed with defendant because he had no place else to go. He also stated that, based on his recollection of the victim's testimony, defendant did not perform oral sex on the victim the same day that the photographs were taken. He argued that it was reasonable for the victim to remember the date the oral sex occurred when it happened the day before he saw his grandparents and he did not normally see his them. The comments were not improper.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to object when the prosecutor, in closing and rebuttal argument, appealed to the jury to sympathize with the victim. We disagree.

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174,

185; 748 NW2d 899 (2008). Counsel is not obligated to make a futile objection. *People v Davenport (After Remand)*, 286 Mich App 191, 199; 779 NW2d 257 (2009). Because the prosecutor did not appeal to the jury to sympathize with the victim, any objection by defense counsel to the challenged remarks would have been futile. Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering